PUBLIC PROSECUTOR

v.

MAT NAWI ISMAIL

HIGH COURT MALAYA, KOTA BHARU
KC VOHRAH J
[CRIMINAL APPEAL NO. 29 OF 1985]
11 OCTOBER 1986

CRIMINAL LAW AND PROCEDURE: *Customs Act 1967 - Section 111A(2) - Respondent convicted for failing to stop vehicle he was driving for purpose of customs inspection - Vehicle returned to respondent - Appeal by Public Prosecutor - That vehicle should have been forfeited under s. 127(1) of the Act - Whether there should be forfeiture of the vehicle.*

The respondent was charged under s. 111A(2) of the Customs Act 1967 (the "Act") for failing to stop the vehicle he was driving for the purpose of customs inspection. The respondent was convicted but the vehicle was returned to him. The Public Prosecutor appealed against the Magistrate's Order returning the vehicle. The Public Prosecutor argued that by committing the offence under s. 111A the vehicle fell within the 2nd limb of the forfeiture provision in s. 127(1) of the Act.

Held:

[1] he seizure provision in s. 114 of the Act provides that things liable to seizure are (a) goods which were the subject matter of the offence and (b) goods which were used in the commission of the offence.

[2] Section 127 of the Act provides for the forfeiture and disposal of the 2 categories of goods in s. 114.

[3] In the present case, since the vehicle did not fall into category (a) of s. 114, it can only fall within category (b) of s. 114 if there can be established a *nexus* between the vehicle and the goods which are the subject matter of an offence under category (a), either by containing the goods or by being used in connection with such goods. Only in such a situation would the forfeiture provision of s. 127 come into operation.

[4] In this case the vehicle did not contain any goods which were dutiable under the Act and hence no offence was committed in respect of the goods that were in the vehicle. There should therefore be no forfeiture under s. 127 of the Act.

[Order of Magistrate returning car to respondent confirmed.]

Case referred to:
Reg v. Ng Hee Weng & Ors. [1956] 22 MLJ 85

Legislation referred to:
Customs Act 1967, ss. 110,(1), 111A,(1), 114, 114(1), 123, 126, 127,(1)

For the public prosecutor - Ahmad bin Haji Maarop, DPP
For the respondent - Apandi bin Ali; M/s. Yusof & Apandi

JUDGMENT

KC Vohrah J:

In the Tumpat Magistrate's Court the respondent pleaded guilty to the following charge-

> That you, Mat Nawi bin Ismail, I/C No. 674564 of 1292, Kg. Telaga Bata, Tumpat, Kelantan, at about 8.30 a.m. at Pasir Pekan, in the District of Tumpat, in the State of Kelantan, being the driver of car, to wit, registration number DG 899 Model Datsun 220C, coming from the direction of Wakaf Bahru towards, Kota Bharu, arriving at a Customs Road-block erected at the ex-Toll House, Pasir Pekan, Tumpat, did fail to comply to the signal of the proper officer of Customs and signboard, to wit, Berhenti Pemeriksaan Kastam, requiring the said vehicle registration number DG 899 to stop for customs examination and you have thereby committed an offence under s. 111A(2) of the Customs Act 1967 and punishable under the same Act.

The respondent was convicted and fined RM250 in default 1 month's imprisonment. The car DG 899 which the respondent used at the time of the commission of the offence was ordered to be returned to the respondent.

The Public Prosecutor has appealed against the Magistrate's order returning the car. The contention is that the forfeiture provision of s. 127 of the Customs Act 1967 (the Act) is mandatory and that the car should have been forfeited.

The relevant facts adduced by the prosecution and admitted to by the respondent showed that on 12 March 1985 he drove the said car. When he failed to stop the car at the customs road-barrier as required to do so by a signal from a customs officer, the customs chased the car until the respondent abandoned the car at a cul-de-sac and ran away. Dutiable goods were found in the car. The same morning, however, the respondent surrendered himself to the Customs. According to the Customs the respondent claimed that he was transporting the goods found in the car to a third person; he had disregarded the customs road-barrier because he had thought that duty had not been paid on those goods. But on 7 April 1985 he produced receipts indicating that payment of duties had been made on the goods. The customs then released the goods to him. The car was however detained.

The question is, was the Magistrate right in not ordering the forfeiture of the car?

It was argued by Encik Ahmad bin Hj. Maarop, Deputy Public Prosecutor, that since the driver had failed to stop the car in compliance with the signal of a proper officer of customs at the customs barrier, the car had been used in the commission of an offence under s. 111A; the car fell within the second limb of the forfeiture provision in s. 127(1) of the Act and had to be forfeited.

Encik Apandi bin Ali for the respondent, however, argued that there could only be a forfeiture under the second limb of s. 127(1) if, as s. 126 and the opening words of s. 127 indicate, the car was, in the first place, liable to seizure. He submitted that the car was not liable to seizure as the seizure provision of the Act under s. 114 did not contemplate the seizure of a car for an offence under s. 111A.

Section 111A of the Act does not contain any provision for the seizure of a vehicle of a person who does not stop the vehicle. One therefore has to look at s. 14 whether it may be seized.

It will be noted that the seizure provision in s. 114 and the forfeiture provision in s. 127 of the Act correspond with the provisions in ss. 110 and 123 respectively of the Customs Ordinance 1952 (which the Act repealed). These ss. 110 and 123 were the subject matter of judicial interpretation in 1956 by the then Court of Appeal in the case of *Reg. v. Ng Hee Weng & Ors.* [1956] 22 MLJ 85.

In that case Good J held that where a vehicle used in the commission of an offence had been seized by a customs officer under s. 110 of the Customs Ordinance 1952 and if it was proved to the satisfaction of the Court that the vehicle had been so used, s. 123 of the Ordinance gave no discretion to the Court, but rendered an order for forfeiture mandatory.

It will be noted that the Court observed that the said s. 110(1) enumerated the things that were liable to seizure and this the subsection did by setting them cumulatively in two categories as-

(a) goods which were the subject matter of the offence; and
(b) goods which were used in the commission of the offence.

Then the forfeiture provision of s. 123 (s. 127 of the Act) would come into operation. The section provided for the disposal of the two categories of things which were seizable under s. 110(1). And forfeiture had to be ordered if they were proved to the satisfaction of the Court to fall into either category.

Good J in explaining the nature of the goods which fell either in category (a) or (b) said that the goods in category (a) were goods referred to in the first part of s. 110(1) (presently, s. 114(1) of the Act), i.e. "goods in respect of which there has been or there is, reasonable cause to suspect that there has been committed any offence against this Ordinance or regulations made thereunder, or any breach of the provisions of this Ordinance or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted."

Good J added that "that the goods in category (b) are the receptacles, packages, **conveyances**, vessels and aircraft mentioned in the second part of s. 110(1) i.e. those **in which the goods first mentioned may have been found,** or **which have been used in connection** with such offence or breach." [emphasis mine].

This explanation of Good J as regards the nature of the goods in category (a) or (b) which may be seized under s. 110(1) of the Customs Ordinance 1952 is certainly applicable to the interpretation of the corresponding s. 114 of the Customs Act 1967.

Thus, it seems clear that if a conveyance is not the subject matter of an offence under the Customs Act under category (a), it can only fall under category (b), within the context of s. 114(1) of the Act, if there can be established that there is a nexus between such conveyance and goods which are the subject matter of an offence under category (a). Whether such goods in category (a) are seized or not, if the conveyance had within it such goods, or if the conveyance had been used in connection with such goods, the conveyance may be seized. There being such a nexus the conveyance can be considered properly seized. Only then would the forfeiture provision of s. 127 come into play.

It will be noted, however, that a person who commits an offence under s. 111A(1) of the Act for failing to stop does not commit an offence in relation to goods. If he fails to stop, he may be apprehended by a proper officer of customs. On the other hand, if he fails to stop the vehicle he is in, the vehicle may only be stopped by a proper officer of customs and that is as far as s. 111A(1) allows a proper officer of customs to go in respect of the car. There is no power of seizure of the vehicle.

However if there are goods in the car, the power to seize the vehicle under s. 114(1) may arise. This power would only arise if there is reasonable cause to suspect that in respect of these goods there has been committed an office against the Act or any regulations made thereunder.

In the present case the car was abandoned after a chase. Goods were found in the car. And they were reasonably suspected to be dutiable and therefore the car was lawfully seized. But the goods were subsequently released upon proof that duty had been paid on them. No offence having been committed in respect of these goods, the car should then have been released. No question of forfeiture arises under s. 127 of the Act in the circumstances. I accordingly confirm the order of the Magistrate returning the car to the respondent.

Also found at [1987] 2 CLJ 83